SJK, Inc. d/b/a Fremont Ford *and* International Association of Machinists and Aerospace Workers, AFL–CIO, East Bay Automotive Machinists Lodge No. 1546, District Lodge 190. Case 32–CA–151443

January 9, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This case is on remand from the United States Court of Appeals for the Ninth Circuit. On June 16, 2016, the National Labor Relations Board issued a Decision and Order in the above-titled proceeding,[1] finding that the Respondent violated Section 8(a)(1) of the Act by unlawfully maintaining a mandatory arbitration agreement.

The Respondent and the Charging Party filed petitions for review with the United States Court of Appeals for the Ninth Circuit. The Board filed a cross-application for enforcement of its Order. The court held the proceedings in abeyance pending the Supreme Court decisions in *Murphy Oil USA, Inc. v. NLRB* and related cases.

The Supreme Court subsequently issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act (FAA). Id. at __, 138 S.Ct. at 1619, 1632.

Following the Supreme Court's decision in *Epic Systems*, the Board filed a motion with the court to remove the instant case from abeyance. The Charging Party filed a response. On July 17, 2018, the court vacated the Board's decision in its entirety and remanded it to the Board with instructions to "consider whether the FAA applies here, and for such reconsideration as the NLRB deems necessary in light of *Epic Systems*."

In light of the Supreme Court's decision in *Epic Systems*, which overruled the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the mandatory arbitration agreement is unlawful based on *Murphy Oil* must be dismissed. We have considered the Petitioner's alternative legal theories as to the arbitration agreement and find them to be without merit.[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 9, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] 364 NLRB No. 29 (2016).

[2] We reaffirm the finding in the prior Board decision that the Charging Party's Joinder in Motion for Summary Judgment raised substantive arguments that are wholly outside the scope of the General Counsel's amended complaint. 364 NLRB No. 29, slip op. at 2 fn. 1. At no point in this litigation has the General Counsel argued that a violation must be found on any basis other than the rationale underlying the holding in *Murphy Oil*. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. See, e.g., *FAA Concord H, Inc. d/b/a Concord Honda*, 367 NLRB No. 104, slip op. at 1 fn. 3 (2019); *Hobby Lobby Stores, Inc.*, 367 NLRB No. 78, slip op. at 1 fn. 3 (2019); see also *Kimtruss Corp.,* 305 NLRB 710 (1991). This procedural rationale extends to the Charging Party's contentions that a violation can be found here because the FAA does not apply. We find no need to address individually the other issues raised by the Charging Party.